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INTRODUCTION

In order to enhance the meaningfulness, credibility and influence of the Ombudsman's scrutiny of the actions of authorities, it is important and fair that the Ombudsman provide standards by which his own determinations can be understood and, if need be, criticized. Making these standards explicit also encourages reasoned dialogue between the Ombudsman and the authorities.

First drafted in 1982 and subsequently amended in 1984, the Code of Administrative Justice was created by the first British Columbia Ombudsman, Karl Friedmann. It provided a focus for the work of the Ombudsman for almost two decades. Shortly after I became Ombudsman, I decided that it would be useful to update and reissue the Code, which, along with our 2000 Annual Report (which explains how we interpret our discretion to investigate), would assist the public and authorities to understand how our Office interprets and applies the ***Ombudsman Act*** in our day-to-day operations. I would also like to take this opportunity to express my appreciation to all of the staff who have reviewed the 2003 Code and provided their comments and suggestions. In particular, I would like to thank my General Counsel, Greg Levine, who devoted many hours to this project and who was instrumental in ensuring its success.

Section 23 of the ***Ombudsman Act*** RSBC 1996, c.340 provides a guide to the matters upon which the Ombudsman must report if he finds problems in the administration of authorities.

The Code is based on s. 23(1) of the ***Ombudsman Act*** which states:

> 23 *(1) If, after completing an investigation, the Ombudsman is of the opinion that*
>
> *(a) a decision, recommendation, act or omission that was the subject matter of the investigation was*
>
> *(i) contrary to law,*

(ii) unjust, oppressive or improperly discriminatory,

(iii) made, done or omitted under a statutory provision or other rule of law or practice that is unjust, oppressive or improperly discriminatory,

(iv) based wholly or partly on a mistake of law or fact or on irrelevant grounds or consideration,

(v) related to the application of arbitrary, unreasonable or unfair procedures, or

(vi) otherwise wrong,

(b) in doing or omitting an act or in making or acting on a decision or recommendation, an authority

(i) did so for an improper purpose,

(ii) failed to give adequate and appropriate reasons in relation to the nature of the matter, or

(iii) was negligent or acted improperly, or

(c) there was unreasonable delay in dealing with the subject matter of the investigation,

the Ombudsman must report that opinion and the reasons for it to the authority and may make the recommendation the Ombudsman considers appropriate.

What follows are an outline and discussion of key terms of the Code and the principles which underlie them. The principles themselves constitute a Code which facilitates consideration and evaluation of the administrative actions of authorities under the Ombudsman's jurisdiction[1].

Each principle is illustrated with hypothetical examples. Cases such as these may have occurred and may well occur but they are only used to illustrate principles. The examples should not be taken as factual or as referring to any given case, authority or person. Some of the examples might illustrate more than one principle.

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[1] Recommendations, decisions, acts and omissions are administrative actions or failures to act which implement or fail to implement government policies or apply or fail to apply statutes, regulations or by-laws to particular situations.

1. CONTRARY TO LAW (s.23(1)(a)(i))

It is significant that the first ground upon which the Ombudsman is to make findings is whether or not an action is contrary to law. Institutional adherence to the rule of law is critical in fair administration. While the courts may be the ultimate arbiters of the meaning of laws and whether or not they have been violated, the Ombudsman is empowered to offer his views as to whether or not actions are contrary to law.

An action or failure to act will be contrary to law if it is unauthorized, contrary to statutory directive or common law doctrine, or in breach of the order or direction of a court or tribunal.

a. Unauthorized acts

Principle: **Unauthorized acts are those beyond the jurisdiction or power of an authority. Such acts have no constitutional basis, legislative authorization, or common law justification.**

Example: A public body charges a fee for a service. It does so pursuant to policy but the policy exceeds the power or jurisdiction of the public body. In the absence of any statutory authority or authorization by an enactment the public body has acted contrary to law.

b. Failure to comply with statutory directives

Principle: **An authority acts contrary to law when it fails to comply with statutory directives.**

Example: An institution fails to inform a person of his right to appeal despite a clear requirement in an enactment to

provide that information. Such a failure is clearly contrary to law.

c. Failure to follow common law doctrines

Principle: **An authority acts contrary to law if it is in breach of rules or duties of law established by courts.**

Example: A ministry fails to fulfill the terms of a contract. This is breach of contract which is a failure to follow a common law doctrine, and hence it is contrary to law.

d. Failure to comply with the order of a court or tribunal

Principle: **An authority acts contrary to law when it fails to comply with the order of a court or tribunal directed specifically to the authority, unless the authority has taken the legal steps required to challenge the order or to have its effect suspended.**

Example: An agency interprets a court order to say that a payment must be made to the agency within one month when the order clearly states that it can be paid within a two-month period. While the agency has administrative reasons for its interpretation, it cannot alter a court order. Such an alteration without court authorization is clearly contrary to law.

2. UNJUST (s.23(1(a)(ii) and (iii))

To be just is to be impartial, equitable and fair and to make well-founded decisions[2]. Being unjust has substantive as well as procedural aspects.

[2] e.g. see *The New Shorter Oxford English Dictionary* [1993], at 1465

The merits of a decision may be questionable or the process in arriving at a decision or act may be flawed and both circumstances may result in injustice. Conversely, valid claims may be unjustly dismissed for procedural or technical reasons.

a. Substantive Injustice

Generally that which is substantive has a firm basis and is significant or important and, in law, things which are substantive relate to rights, duties and merits[3].

Principle: **Where an authority is exercising a discretionary power the merits of its decision may be reviewed on the basis that it has made the wrong choice of a governing law, right, rule, or policy.**

It is unjust for an otherwise valid claim to be defeated because of the claimant's failure to adhere to procedural requirements, if such failure does not prejudice any other person or authority. Administrative decisions should be made on the basis of the real merits and justice of the case. If the failure to comply with the procedural requirement does not interfere with the authority's ability to reach such a decision, the authority should have the discretion to waive the procedural defect.

Sometimes it is appropriate in reviewing administrative decisions to assess the evidence in order to reach independent conclusions about the merits of a case. Upon arriving at an understanding of the case which differs from that of the authority and the

[3] e.g. see *The New Shorter Oxford Dictionary* [1993] at 3124

authority is unable to explain why this understanding is wrong, the authority will be seen to have erred in its choice of inference in determining the factual issues.

Example: A public agency holds an employee responsible for the agency's inappropriate or illegal actions. Such action works a substantive injustice on the employee.

b. Formal injustice

Formal injustice is related to defects in the reasoning process which produce a decision, as opposed to the correctness of the decision, although it may well have a bearing on correctness.

Principle: **Administrative justice requires consistency in the application of determinative principles and standards. When the law spells out a test to apply, or when an authority has adopted a reasonable policy as a guide to the exercise of its discretion, the test or policy ought to be applied so that similar cases are treated in a similar way. Otherwise the authority acts arbitrarily, and an arbitrary decision is an unjust decision.**

Although there may not be a stated policy guideline, a determining principle may be inferred from an authority's decisions in similar cases in the past. An authority's previous decisions cannot be binding on it as precedent. However, it ought to treat similar cases similarly, unless there is sound reason for treating them differently.

A decision which is not supported by sufficient evidence is arbitrary and therefore unjust.

A failure to consider relevant factors can lead to arbitrary decisions and is therefore unjust. Relevant factors may

include factual considerations, as well as governing principles. In addition, a decision-maker should address the correct issue in the case.

Example: A ministry applies a policy respecting refunds inconsistently and indeed arbitrarily thus denying some people benefits to which they are entitled while ensuring others receive the benefits. Such a practice constitutes a formal injustice.

3. OPPRESSIVE (s.23(1)(a)(ii) and (iii))

Oppressive behaviour is behaviour that is burdensome, unreasonably harsh, or cruel[1]. Oppression is the act of unjustly exercising power or the abuse of discretionary authority[2].

Oppressive acts are judged by their effects, not the motives of those who do them. There are two instances which are particularly problematic in administrative matters. They are: setting unreasonable preconditions and bullying.

a. Unreasonable preconditions

Principle: **A precondition is oppressive when it has the effect of unreasonably overburdening a person in the pursuit of his legal entitlement.**

Example: An agency requires a person to incur a debt to another institution or government without explaining why, and how the debt will occur. This may be seen as oppressive.

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[1] e.g. see *The Dictionary of Canadian Law* [1995], at 843; *The New Shorter Oxford English Dictionary* [1993], v.2, at 2010

[2] e.g. see *Black's Law Dictionary* [1999] at 1121

b. Abuse of Power

Principle: **An act or decision is oppressive when the authority uses its superior position to place the complainant at an unreasonable disadvantage.**

Example: An agency requires people to attend at its office to apply for a service, refuses to deal with people by phone or mail and only deals with a small number of people who do manage to show up at its office. In so doing it inconveniences people, makes them vulnerable to its processes and abuses its position. Such behaviour is oppressive.

4. IMPROPERLY DISCRIMINATORY (s.23(1)(a)(ii) and (iii))

Discrimination in a general sense is the act of distinguishing or making distinctions[6]. Making distinctions is at times necessary to accomplish useful and meaningful public administration. Such general discrimination should be distinguished from discrimination in a legal sense which is inappropriate distinguishing of people based on personal characteristics and which imposes burdens or disadvantages on those so distinguished[7].

Principle: **Discrimination is improper if it is not reasonably required for the attainment of the overall purpose of the administrative or legislative scheme which it is intended to serve or if it is inconsistent with the**

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[6] e.g. see The New Shorter Oxford English Dictionary [1993], at 689

[7] e.g. see *The Dictionary of Canadian Law* [1995], at 338

distinguishing criteria established in an enactment or in a policy pursuant to an enactment.

Example: An institution requires an illiterate person to communicate in writing when written communication is not required to achieve a particular purpose. This may be seen as improperly discriminatory.

5. MISTAKE OF LAW (s.23(1)(a)(iv))

Mistake of law is typically seen as an error in regard to a general rule of law or an error relating to the legal consequence, relevance or significance of a set of facts or circumstances[8]. Making a mistake of law should be distinguished from acting contrary to law as it is an attempt to follow the law but is based on a mistake, i.e. "an error, misconception, misunderstanding or erroneous belief" [9].

Principle: **An authority makes a mistake of law when it misperceives or misinterprets a provision of an enactment or a common law rule.**

Example: Although entitled by statute to require a party to its process to pay costs to another party, a tribunal misinterprets the allowable amounts of such costs and the basis for the awards. Such a misinterpretation is a mistake of law.

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[8] e.g. see *The Dictionary of Canadian Law* [1995] at 755

[9] *Black's Law Dictionary* [1999] at 1017

6. MISTAKE OF FACT (s.23(1)(a)(iv))

As noted above, a mistake is an error, misconception or erroneous belief. It can be seen also as a wrong or incorrect view and/or erroneous supposition[10]. Mistake of fact then is a misapprehension or misunderstanding of the facts, circumstances or evidentiary base of a case or situation. A mistake of fact is "a mistake about a fact that is material to a transaction or matter or issue" [11].

Principle: **A mistake of fact occurs when an authority is mistaken as to the existence of a certain fact or facts. A mistake of fact is a question of perception or knowledge on the part of the authority.**

A mistake of fact may occur when a wrong inference or conclusion of fact results from the authority's lack of knowledge of evidence which, if known, would have resulted in a different conclusion of fact.

Example: An agency fails to determine that a person meets the criteria for entitlement to a benefit because it misinterprets the information provided about that person. This is a mistake of fact.

7. IRRELEVANT GROUNDS OR CONSIDERATION (s.23(1)(a)(iv))

Something is relevant when it applies to the matter in issue[12]. Conversely it is irrelevant when it is inapplicable to a matter or does not tend to

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[10] e.g. see *The New Shorter Oxford English Dictionary* [1993] at 1794,1795

[11] *Black's Law Dictionary* [1999] at 1017

[12] e.g. see The Dictionary of Canadian Law [1995] at 834

prove or disprove a matter[13]. Giving attention to extraneous matters and circumstances may be seen as acting on irrelevant considerations[14].

Principle: **An act of an authority is based on irrelevant grounds or considerations when it pays attention to and utilizes extraneous matters, circumstances, policies and rules.**

Example: An agency denies a benefit based on an individual's work record but work record is not one of the criteria outlined in legislation and policy as a basis for such a decision. The agency has clearly based its decision on an irrelevant consideration.

8. ARBITRARY PROCEDURE (s.23(1)(a)(v))

To be arbitrary is to act upon one's will or for one's own pleasure or to act on mere opinion or preference[15]. An arbitrary decision is founded on prejudice or preference rather than on reason or fact [16].

An arbitrary procedure would be a process or procedure which is without foundation in law or fairness and which reflects mere convenience or preference or prejudice of whoever established the process or procedure.

Principle: **An authority invokes or utilizes an arbitrary procedure when it uses a procedure which fails to adhere to relevant principles of natural justice and**

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[13] e.g. see *Black's Law Dictionary* [1999] at 834

[14] e.g. see D. Jones and A. de Villars *Principles of Administrative Law* [1999] at 164 to 166

[15] e.g. see *The New Oxford Shorter English Dictionary* [1993] at 107

[16] e.g. see *Black's Law Dictionary* [1999] at 100

which is designed for mere convenience of the authority or is based on preference or prejudice.

Example: A ministry allows a service to continue in one area but denies the service to another area even though both areas seem to have similar concerns and situations. The ministry has no clear policy for allocating the service. Its procedure thus appears arbitrary.

9. UNREASONABLE PROCEDURE (s.23(1)(a)(v))

To be reasonable is to exercise sound judgment, to be sensible or to act with reason[17]. Unreasonable activity by institutions will be those actions taken, decisions made or standards adopted which no sensible authority or institution would do, make or adopt[18].

Principle: **An unreasonable procedure is one which fails to achieve the purpose for which it was established.** This test focuses on the rationale for a procedure and the results it produces or is likely to produce. The term may be seen as a synonym for an incompetent procedure on the basis that such a procedure is an absurdity and thus contrary to reason.

Example: An agency involves relatives of the applicant in its decision to grant assistance to an individual. While the agency is concerned that others who know the individual should know of her circumstances, its practice is not a

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[17] e.g. see The New Shorter Oxford English Dictionary [1993] at 2496

[18] e.g. see The Dictionary of Canadian Law [1995], at 1026

reasonable requirement as the assistance is solely for the individual. This could be seen as an unreasonable procedure.

10. UNFAIR PROCEDURE (s.23(1)(a)(v))

To be fair is to be impartial and just[19]. A fair hearing is one that is unbiased and allows a party to a dispute to adequately state his/her case[20]. In law, fairness is an outgrowth of the idea of natural justice which incorporates those key notions of unbiased decision-making and affording opportunities to be heard[21]. Increasingly, the law is acknowledging as well that reasons are a necessary element of fairness[22].

Decision-making procedures are the primary focus of Ombudsman findings under this heading.

Principle: **There are two main elements of procedural fairness:**

<u>An adequate opportunity for the person affected to be heard before the decision is made.</u>
What constitutes an adequate opportunity will vary according to the circumstances. The degree of formality required will generally relate to the seriousness of the consequences of the decision for the individual concerned and his or her ability to use the available procedures. For example, an oral, in-person hearing will be demanded more for a prison disciplinary decision than it will for a

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[19] e.g. see Black's Law Dictionary [1999] at 614

[20] e.g. see The Dictionary of Canadian Law [1995] at 432

[21] e.g. see D. Jones and A. de Villars Principle of Administrative Law [1999], Ch.8

[22] e.g. see Baker v. Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817

decision whether to grant a parade permit. The existence of meaningful review will also be a factor tending to reduce the need for formality. The impact of the decision on the community may dictate a formal hearing. At a minimum, fairness will usually require adequate notice of the proposed action, as well as of the criteria to be applied, plus an opportunity to make representations. In some cases of emergency it may not be possible to give much or any notice of the proposed action. However, in such cases adequate review procedures should be available.

An unbiased decision-maker

Good faith and an open mind are qualities of the decision-maker which are essential to maintaining the integrity of public administration. The decision-maker should not have any "interest" in the outcome of the decision nor should s/he show any pre-judgment of the issue to be decided.

Example: An agency fails to notify an individual who may be affected by its decision about his property and surrounding property. Failure to notify denies the individual an opportunity to make representations about the decision.

11. OTHERWISE WRONG (s.23(1)(a)(vi))

Something is wrong when it is unjust, improper, lacking in rectitude, or inequitable[23]. A wrong may be a breach of a duty or a violation of

[23] e.g. see The New Oxford Shorter English Dictionary [1993] at 3732

another's rights[24]. In a broader sense wrong is injury[25]. "Otherwise" means in other respects or in a different way[26].

Principle: **This is a residual ground upon which findings may be made. It reflects a concern with harm, injury, incorrect behaviour and results which are not captured in the preceding grounds.**

Example: An official states that a person should be grateful for anything she gets under a program which in fact entitles her to benefits. It is inappropriate to make such statements in the exercise of a public duty.

12. IMPROPER PURPOSE (s.23(1)(b)(i))

That which is improper may be "incorrect, unsuitable or irregular" [27]. Acting for an improper purpose implies acting in an unauthorized way or with an inappropriate intent or motive. Acting for an improper purpose is a serious abuse of discretion[28].

Principle: **An authority has acted for an improper purpose in the following situations:**

a) When an act or decision is motivated by favouritism or personal animosity towards the individual who is directly affected.

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[24] e.g. see *Black's Law Dictionary* [1999] at 1606

[25] e.g. see The Dictionary of Canadian Law [1995] at 1366

[26] The Oxford Desk Dictionary [1995] at 407

[27] Black's Law Dictionary [1999] at 761

[28] e.g. see D. Jones and A. de Villars, *Principles of Administrative Law*, Ch. 7

b) When there is an intention on the part of the authority to promote an objective other than that for which a power has been conferred on it.

Example: An agency refuses to consider the bids of two suppliers because two other firms are favoured by the agency for a variety of reasons, some of them related to the actual work. Such favouritism is inappropriate and acting on it serves an improper purpose.

13. ADEQUATE AND APPROPRIATE REASONS (s.23(1)(b)(ii))

Reasons are the basis for judgments. Formally, "reasons" provide the rationale behind and justification for decisions or actions. They provide a summary of analysis and are a means to facilitate understanding as well as a means to allow meaningful appeal of such decisions and actions.

Adequate reasons will be those which are sufficient to allow an understanding of the issues considered and the decisions reached. Appropriate reasons will be logically linked to the questions with which the decision-maker dealt.

Principle: **In assessing the adequacy and appropriateness of reasons, three major factors are important:**

a) whether the person's concerns are addressed directly and completely;

b) whether the reasons plainly state the rule upon which the decision proceeds and whether the rule as applied to the facts logically produces the decision reached; and

c) **whether the reasons are comprehensible to the recipient.**

Example: A public body denies a person a license but initially does not explain why the license is not forthcoming. There is an appeal process but the person has no basis on which to appeal in the absence of any reason. When he presses the public body for information he is told he is denied because "that is the way things work." There is in such a situation a lack of appropriate, adequate and comprehensible reasons.

14. NEGLIGENT (s.23(1)(b)(iii))

In general, one is negligent when one is "inattentive to what ought to be done" [29]. In law, one is negligent when one fails "to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance"[30]. Negligence is conduct which "falls below the standard required by society" and it is also a cause of action in law[31].

Principle: **An authority is negligent if it fails to meet a standard of care it owes to the public. Negligence in administration is the failure to exercise proper care or attention in the performance of a public duty.**

In deciding whether a duty arises, it is important to ascertain whether the complainant was dependent on the authority. Such dependence is strongly indicated if the authority is in a superior position because of its exclusive access to information, its expertise, its ability to require the

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[29] The New Oxford Shorter English Dictionary [1993], at 1899

[30] Black's Law Dictionary [1999] at 1058

[31] A. Linden, *Canadian Tort Law* (1997) at 98

person to perform some act prejudicial to his interests, etc. It is reasonable to expect an authority to recognize a situation in which the person with whom it is dealing is dependent on it and to exercise sufficient care in the circumstances to avoid damaging or prejudicing the person's position. The exact duty that an authority owes a person or the public at large will depend on the circumstances of the case. Although an authority may not consider that it has a duty of care, or it may not have previously addressed the duty, such a duty may still be seen to exist.

Example: A public institution provides a service to the public which among other things includes educational benefits. The institution fails to inform the individuals who accept the benefits of all of the associated financial costs. Relying on the general statements of the institution, individuals apply for and utilize the benefits and then find themselves in debt. The institution may be seen to be negligent in its delivery of the service and the information provided to the public about the benefits of the service.

15. ACT IMPROPERLY (s.23(1)(b)(iii))

As noted above in s.12, that which is improper is "incorrect, unsuitable or irregular"[32]. Improper actions may be intentional or reckless.

Principle: **An authority acts improperly when it intentionally or recklessly breaches a duty which it owes towards a person and thereby results in adverse consequences for him or her. The element of intention or recklessness distinguishes this ground from negligence.**

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[32] Black's Law Dictionary [1999] at 761

Sometimes there will be a breach of an official rule or policy governing the situation. If so, this will be strong evidence that an authority which departs from the policy or rule knew or ought to have known that it was in breach of duty and, therefore, intended to cause the resulting harm.

Example: Informed of the impact of not providing information about a person's status to another institution, an official does not bother to provide the information in a timely manner. Ignoring the importance of this matter, the official puts off sending the information for two months beyond a stated deadline. The delay costs the person several thousand dollars. Given that the official knows the potential impact his behaviour is reckless.

16. UNREASONABLE DELAY (s.23(1)(c))

To delay is to postpone, put off or slow down[33]. Delay may be part of the exigencies of the modern state. While sometimes it maybe unavoidable, it should not be burdensome, infringe on rights or entitlements or unduly affect public services.

Principle: **Delay is unreasonable whenever service to the public is postponed improperly, unnecessarily or for some irrelevant reason.**

Example: A tribunal takes three years on a case for which it would normally take six weeks. The tribunal is unable to provide an explanation for the delay. Such delay is unreasonable on its face.

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[33] e.g. see Black's Law Dictionary [1999] at 437; The Dictionary of Canadian Law [1995] at 310

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